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## Agenda Item 5a

March 15, 2011

### TO: MEMBERS OF THE BENEFITS AND PROGRAM ADMINISTRATION COMMITTEE

- I. **SUBJECT:** Policy for Proposed Decisions from the Office of Administrative Hearings
- II. **PROGRAM:** Administration
- III. **RECOMMENDATION:** That the Committee recommends:
- That the Board adopt the revised Policy as set forth in Attachment B; and
  - That the Board retain external counsel to advise the Board in connection with Proposed Decisions

#### IV. ANALYSIS:

In February 2011, staff submitted to this Committee for a first reading, a proposed policy designed to set forth the procedures under which the California Public Employees' Retirement System (CalPERS) will present proposed decisions (Proposed Decisions) of the Office of Administrative Hearings (OAH) to the Board of Administration (Board). The purpose of the Policy for Proposed Decisions from the OAH (the Policy) is to ensure that the CalPERS review process for Proposed Decisions provides procedural fairness to all parties, avoids even the appearance of impropriety or improper influence, preserves neutrality of all Board decisions and provides a process for the Board to obtain neutral legal advice when needed on substantive or procedural legal issues arising during the review of any Proposed Decision.

By way of background, the Board's existing written policy for procedures related to the review of Proposed Decisions dates back approximately 25 years. The Policy serves to update the old policy by incorporating into one written policy all existing practices that have evolved since the Board's adoption of the old policy.

The Policy outlines the procedures to be followed from the time a Proposed Decision is received from the OAH through the time the Board considers and takes action on a Proposed Decision at a regularly scheduled meeting. The Policy articulates the steps staff will take in preparing agenda items for the Board and outlines the four main components to be included in these agenda items, including:

- A copy of the Proposed Decision;
- A brief factual procedural summary of the case;
- Written arguments received from the advocates representing all parties in the case; and
- A description of the alternatives available to the Board relative to the Proposed Decision.

Agenda items will no longer include staff's recommended action on the Proposed Decision. Staff's written argument will be included along with all other arguments received from the parties to the case.

Additionally, in the Policy as proposed in February, in order to improve the procedures for the Board's consideration of Proposed Decisions, staff recommended the Board direct CalPERS legal staff to retain outside counsel that could provide legal advice to the Board on substantive and procedural issues as needed during the Board's consideration of and action on Proposed Decisions. Under the Policy as proposed in February 2011, Board members would have only been able to pose legal questions about pending Proposed Decisions at the time of the Board's meeting. A copy of the February 2011 Agenda Item is attached as Attachment A.

At the February meeting, the Committee requested staff modify the Policy to allow individual Board members to submit written questions for outside counsel before the Board's meeting. The Policy has been revised to allow individual Board members to submit written questions for counsel to the Board President prior to the date of the Board's meeting. Any questions received will be sent to outside counsel to provide counsel an opportunity to research the questions before the Board's meeting. Counsel will attend the Board's meeting and provide legal advice responsive to the questions posed to all Board members present.

A copy of the revised Policy is attached as Attachment B; revisions after the first reading are reflected in double underline for additions and strikeout text for deletions.

The Committee also requested staff propose a process for selecting outside counsel, should the Board adopt staff's recommendation to retain outside counsel as contemplated under the Policy. Staff proposes the Board consider issuing a solicitation inviting firms or contract attorneys to submit applications for the outside counsel position discussed in the Policy. A proposed draft solicitation for outside counsel is attached as Attachment C.

The solicitation as presently drafted would select outside counsel to serve as described in the Policy for the period of May 1, 2011, or as soon thereafter as possible, through December 31, 2013 and would require all application packages to be submitted by 5:00 p.m. on April 5, 2011. The solicitation would allow the Board President to evaluate the application packages on behalf of the Board and determine whether interviews should be conducted of the finalists. If interviews are deemed necessary, the interviews could take place in April of 2011.

**V. STRATEGIC PLAN:**

This supports several goals, including: Goal II – Foster a work environment that values quality, respect, diversity, integrity, openness, communication, and accountability; Goal IV – Administer pension benefit services in a customer orientated and cost effective manner; and Goal X – Develop and administer quality, sustainable health benefit programs that are responsive to and valued by enrollees and employers.

**VI. RESULTS/COSTS:**

There will be additional costs associated with this new policy for the services performed by outside counsel and for minimal costs related to changes in staff procedures and forms.

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